GOH KIM HWA v. KHOO SWEE HUAH

[O.C.J. (Siti Norma Yaakob J.) February 28, 1986]

[Kuala Lumpur Divorce Petition No. 62 of 1980]

Family Law – Divorce – Custody of children given by consent to husband petitioner – Subsequent attempt at reconciliation which failed – Application by wife for custody of children – Change of circumstances – Maintenance of wife and children.

Divorce and Matrimonial Proceedings Rules, 1980, Rule 56(2) – Law Reform (Marriage and Divorce) Act, 1976, s. 78.

In this case the husband petitioner had been granted a decree *nisi* on the ground of desertion by the wife. Both parties then agreed that the three children of the marriage shall be with the husband. Subsequently after the decree *nisi* had been made absolute, the wife returned to the matrimonial home in an attempt at reconciliation but this failed. The wife thereupon applied for custody of the three children, their maintenance and maintenance for herself. The wife alleged that there had been a material change in the circumstances as to warrant a change of custody. The children had been looked after by their paternal grandmother and a maid whom they loved and respected but the maid had left and her replacement was a complete stranger to them. The husband had also brought his mistress, a divorcee with a child from a previous marriage, to live in the same house with the children. When the children were interviewed by the trial judge, the eldest a 13-year old boy chose to live with the father, the second a 12-year old girl chose to live with the mother while the third a 9-year old girl was unsure.

Held: (1) a material change in circumstances had occurred in this case that warranted an order of change of custody, subject to what the three children had to say for themselves. There was no medical evidence to show that the change would affect them in any way. The custody of the eldest boy would be given to the father and the custody of the two girls to the mother;

(2) the husband should pay the mother $400 per month per child as their maintenance, exclusive of all sums agreed to be expended by the father for their education, tuition and medical fees;

(3) the husband should pay the wife maintenance at the rate of $500 per month as agreed by him.

DIVORCE PETITION.

K. Anantham for the mother – applicant.
H.Y. Too for the father – respondent.

Siti Norma Yaakob J.: On June 30, 1980, the husband petitioner in these divorce proceedings, was granted a decree *nisi* to be made absolute in three months on the ground of desertion by the wife respondent. However, both parties agreed that custody of the three children of the marriage shall be with the husband petitioner.

In August, 1983, almost three years after the decree *nisi* had been made absolute, the wife returned to the matrimonial home in an attempt at a reconciliation but this proved to be short-lived and in November 1984, she moved out again and brought this present application seeking custody of the three children, their maintenance and maintenance for herself.

At the hearing of the application for custody, the husband respondent raised the following objections.

1. There is no material change in circumstances as to warrant a change of custody.

2. The applicant is not a fit and proper mother to whom custody can be entrusted.

When the applicant consented to the respondent having custody of the three children in 1980, the arrangement was that the children continue to live with the respondent in the matrimonial home and that they will be tendered to by their paternal grandmother and a maid whom they loved and respected. The maid has since left the respondent's employment and her replacement is a complete stranger to them. Added to this is the fact that the respondent's mistress, a divorcee with a child from a previous marriage, is also living in the same house with the three children. Although the respondent admitted that he eventually intends to marry her, he appears to be in no hurry to do so and is quite content to allow matters to remain as they are. She had moved into the matrimonial home immediately after the applicant left in November, 1984 when the latter's attempt at a reconciliation failed.

Whether or not there has been a material change in the *status quo* of the party to whom custody has been granted must depend on the facts of each case. The presence of the respondent's mistress in the matrimonial home can hardly be described as conducive to the welfare and proper up bringing of a 13-year old boy and his two sisters aged 12 and 9. No right thinking parent can deny that the immoral arrangement by the respondent must have a negative effect on the minds of the three young children. Apart from this, I doubt whether the respondent can spend much time with them as his hours of work as a doctor, running three clinics stretch well into the night. Instances of neglect and cruelty were also cited by the applicant but the respondent chooses to brush these aside as his way of chastising his

children and inculcating a sense of discipline into them as he admits that they come from a troubled home.

Allegations of the applicant's adulterous associations with other men during the marriage were also alluded to by the respondent to show that she is not a fit and proper mother to whom custody can be given. As such conduct was not cited in the respondent's petition, as a ground for divorce, I consider them to be mere allegations for which no proof has been tendered. For the same reason I also cannot accept the respondent's allegations that the applicant is leading an immoral life as evidence of this is merely hearsay. On the contrary, there is evidence that the respondent himself had been guilty of leading an immoral life as his present life style shows and that in 1982, he was sued for maintenance by a woman who claimed that from her association with him, a daughter was born on July 16, 1981. This is not disputed by the respondent.

I had also taken the liberty of speaking to the three children in the absence of their parents and in appearance, they appear to be small for their ages and if not for the fact that the respondent is a doctor, I would easily conclude that they appear to be anaemic to me. When asked whether they wished to move from their present environment, Gary, the eldest, without any hesitation, chose to be with the respondent as he considers that his future lies with him and he is content to keep the present arrangement of seeing the applicant and staying overnight with her once a month. Gail, the eldest daughter however felt that she would like to move in with her mother as she felt that she would be better taken care of as her father had hardly any time for her. Glenda, the youngest, seems to be most timid and unsure of the three and whilst she resented both her father's and his mistress's treatment of her, she was not sure whether living with her own mother can be better as she had only visited her but had not spent nights with her.

From the circumstances of this case, I had concluded that a material change in circumstances has occurred that warrants me ordering a change of custody subject to what the three children had to say for themselves. As there is no medical evidence to show that the change would affect them in anyway, I had, in consideration of their wishes, ordered that Gary, the eldest, continue to remain in the custody of the respondent but that custody of the two girls be given to the applicant. This is so as being girls of the tender ages of 12 and 9 they will need all the love and affection which I consider that only the applicant as a mother can give. Since they had always been together I consider that no good will be achieved if they are to be separated with one parent having the custody of one daughter whilst the other parent has the custody of the other.

On the issue of maintaining the two girls, the applicant had asked for $400 per month per child exclusive of all sums agreed to be expended by the respondent for their education, tuition and medical fees. I hardly expected the respondent to object to this for even if custody of the two girls had remained with him, he is expected to spend some money on them apart from their education, tuition and medical fees. However, he claims that the amount asked for is prohibitive but as a doctor, running three clinics called Clinic Chow, Petaling Jaya Polyclinic and Jinjang Clinic, he can well afford to contribute to their maintenance. In this respect, I do not consider him to be truthful when he stated that he only earned $4000 a month with a take home pay of only $503. He needs more than just his own bare statement to convince me that his monthly gross earning is only $4,000. As I consider the sums asked for are not unreasonable, bearing in mind that the two girls are at that stage of growing up where they need new clothes and other necessities which only money can buy, and as the amount is not prohibitive to the respondent, I had also ordered that the respondent pay the applicant $400 per month per child as their maintenance, exclusive of all sums agreed to be expended by the respondent for their education, tuition and medical fees.

The respondent has also claimed that the applicant is not entitled to any maintenance for herself as she had expressly indicated her intention not to seek any maintenance in the Memorandum of Appearance filed pursuant to service of the divorce petition on her. Moreover, as she had not applied for leave under rule 56(2) of the Divorce and Matrimonial Proceedings Rules 1980, she is barred from making the application.

The divorce petition proceeded as an uncontested matter and following the decree *nisi*, there is documentary proof in letters from counsel acting for both parties that the respondent had, pursuant to some private arrangement he had with the applicant, been paying her $1,000 per month as maintenance. However, since January 1982, he had fallen into arrears and despite

his promises to pay her a reduced sum of $500 from July, 1982, he had not fulfilled those promises and since January, 1982, had not been paying her any maintenance. Under those circumstances, I do not consider that leave is required for the applicant to seek maintenance as the respondent, by his own conduct, has agreed to maintain her all along and therefore Rule 56(2) is not applicable.

My attention was also drawn to section 78 of the Law Reform (Marriage and Divorce) Act 1976 when considering the quantum of maintenance, particularly to the apportionment of blame by either party to the breakdown of the marriage. The respondent maintains that the applicant had left the matrimonial home for another man and as she was the sole cause of the breakdown of the marriage, her conduct disentitles her to any maintenance whatsoever. A perusal of the petition clearly shows that two grounds for divorce are cited, namely desertion without cause and that the marriage had irretrievably broken down. There is no allegation of adultery cited in the petition and if anything at all, both parties must have contributed to the breakdown of the marriage.

The applicant works at the Hongkong and Shanghai Bank, earning a salary of $1,000 per month. The house presently occupied by the respondent and his mistress is registered in her name and she is presently living with her parents in a single storey terrace house which is quite congested. With her two daughters coming to live with her, she has every intention of renting a bigger house and this would mean extra expenses involved.

As I have concluded that the applicant is entitled to being maintained by the respondent and since he had as long ago as 1982 agreed to do so at the rate of $500 per month, I accordingly ordered that the respondent pay her that amount as maintenance with effect from January 1, 1982.

Order accordingly.

Solicitors: *Skrine & Co.; Shook Lin & Bok.*

ABDUL GHAFFAR v. PERBADANAN PEMBANGUNAN BANDAR

[A.C.J. (Harun J.) Janaury 28 & 31, 1985]

[Kuala Lumpur – Civil Appeal No. 56 of 1983]

Landlord and Tenant – Lease – Claim for vacant possession – Notice to quit sent by post – When effective.

A notice to quit sent by registered post is effective at the time when the notice would have been delivered in the ordinary course of the post.

Cases referred to:

(1) *Papillon* v. *Bruntoh* (1860) 5 H. & N. 518; 157 E.R. 1285, 1286.

(2) *Gresham House Estate Co.* v. *Rossa Grande Gold Mining Co.* [1870] W.N. 119.

CIVIL APPEAL.

T. Ariarajah for the appellant.

Syed Ahmad Helmy bin Syed Ahmad Dahlan for the respondent.

Cur. Adv. Vult.

Harun J. : This is an appeal from the decision of the learned Magistrate at Kuala Lumpur given on September 6, 1982 wherein the appellant was ordered to deliver vacant possession of certain premises and pay double rent from March 1, 1982, interest and costs and the counterclaim for damages was dismissed. The respondent was the lessee of a 7-storey building for a term of 10 years expiring in July 1982 and had to deliver up vacant possession of the entire building to the owners by that date. The appellant was a tenant of the respondent of that portion of the premises known as No: 53-A, Jalan Tiong Nam, off Jalan Raja Laut, Kuala Lumpur, on a monthly tenancy.

In view of the imminent expiry of the lease, the respondent decided to terminate the appellant's tenancy. It did this by a written notice to quit dated January 30, 1982 and delivered to the appellant by A.R. registered post. That notice states that one month's notice to quit is being given commencing from February 1, 1982 and expiring on February 28, 1982. The notice was actually received by the appellant on February 6, 1982.

The respondent contends that the notice to quit is good because it took effect the moment it was put in the post on January 30, 1982. The question then is where a notice to quit is delivered through the post, when does it become effective – time of posting or time of receipt.

In *Papillon* v. *Brunton*[1] at page 1286, Pollock C.B. held "that in the case of a notice to quit the putting it into the post-office is sufficient, and that the party sending it is not responsible for its miscarriage."

In *Gresham House Estate Co.* v. *Rossa Grande Gold Mining Co.*[2] it was held that if a letter